

MONTGOMERY COUNTY, STATE OF MARYLAND

Jean Smart
5204 Pooks Hill Road
Bethesda, MD 20814

Complainant

vs.

Pooks Hill Condominium, Inc.
c/o Henry Jacob, Community Association Manager
Chevy Chase Garden Plaza
7605 Arlington Road, Suite 100
Bethesda, MD 20814

Respondent

Panel Chair Memorandum By: John F. McCabe, Jr. :

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: COMMISSION ON COMMON
: OWNERSHIP COMMUNITIES
:
: Case No. 03-673-0
:
: Panel Hearing Date: December 15, 2004
: Decision Issued:

MEMORANDUM DECISION AND ORDER

The above entitled case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing on December 15, 2004, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(f), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended. The duly appointed Hearing Panel considered the testimony and evidence of record, and finds, determines and orders as follows:

BACKGROUND

This is a complaint filed by a unit owner of a condominium on October 30, 2003, against the Condominium. The Complainant contends that:

1. The Pest Management Agreement which the Condominium has entered into with Infestation Control, Inc., dated October 1, 2003, (Respondent's Exhibit 4) should be declared invalid because it does not provide for preventive pest control services but only for investigation

and treatment of infestation after it is discovered.

2. The reconstruction of the wing wall in the general common elements attached to her unit, and the subsequent redirection of the drainage line (a black plastic corrugated pipe approximately 3 inches in diameter) connected to her downspout resulted in water damage to her unit. She seeks the repair of that damage and the restoration of the configuration of the drainage line that existed prior to the replacement of the wing wall which was to run the drainage line above ground.

3. In connection with the water damage to her unit, the Complainant seeks the information necessary so that she may make an insurance claim under the Condominium's master insurance policy.

The position of the Condominium is:

1. The type of pest management agreement the Condominium selects is a matter of business judgment and therefore that decision is not subject to review;
2. After the rebuilding of the wing wall the Condominium may require the drainage line to be buried rather than allow it to run above ground;
3. The Condominium contends that it has not been allowed into the Complainant's unit and therefore it is not in a position to process any insurance claim for alleged water damage to her unit.

FINDINGS OF FACT

1. The Complainant is the owner of a unit in Pooks Hill Condominium, Inc.

2. The Respondent Pooks Hill Condominium, Inc. is a condominium within the meaning of the Maryland Condominium Act, consisting of thirty-two townhouse style units.

3. The Pest Management Agreement (Respondent's Exhibit 4) entered into by the Condominium effective October 1, 2003 is an agreement for annual inspections of the community for termites. Inspections are both inside the units and outside in the common elements. If there is evidence of termite infestation, the contractor will treat the problem. The testimony of Condominium's management agent, Henry Jacobs, was that the Agreement was not meant to be for a preventive service but for an "investigative" service. The reason for this lesser level of service was the Condominium's judgment that it did not want to pay the extra cost for a more comprehensive service.

4. Unit owners are free to contact either the Condominium's contractor or their own contractor to obtain preventative pest management services for their units.

5. The Condominium looked into hiring a new contractor for pest management in 2003.

The Condominium determined that if a new contractor was selected, the new contractor would require that each home be treated before any services could be guaranteed. The cost for this was estimated to be in excess of \$10,000.00. As a consequence, the Condominium decided to remain with the current contractor, who has serviced the community for 15 years.

6. By definition, Article I, Section 1 of the Master Deed recorded at Liber 4265, folio

693 (Commission Exhibit 1, R-95) the condominium units in the Condominium include the units, an area one foot beyond the exterior surfaces of the bearing walls of the units and

windows and doors of the units. The wing wall in question is attached to the Complainant's unit, 5204 Pooks Hill Road and the adjacent unit 5206 Pooks Hill Road in the nature of a party wall. Thus the wall is partially within the areas defined as part of each of those units and partially within the general common elements of the Condominium and it serves both units. (See Commission Exhibit 1, R-97, Article III, Section 1, Master Deed)

7. The Condominium produced testimony and submitted photographic evidence showing that the subject wing wall was deteriorating, cracking, and separating from the adjacent buildings. The wing wall serves the purpose of a retaining wall between Complainant's property and a portion of her front yard, and between Complainant's property and the adjacent unit 5206 Pooks Hill Road, which is lower in grade than Complainant's unit.

8. Complainant has a downspout adjacent to the wing wall, attached to the front wall of her building. For many years she has handled the drainage from that downspout with a black plastic drainage line approximately 3 inches in diameter attached to the downspout and running for several feet above ground into the general common elements.

9. When the Condominium reconstructed the wing wall, its intention was to run Complainant's drainage line underground, through a hole in the wing wall and out to an area near the sidewalk in front of Complainant's property. However, the wing wall was constructed in such a way that the point of penetration through the wing wall was built higher than intended. As a result, running the drainage line could not be accomplished as planned. The Condominium nevertheless buried Complainant's drainage line by running it under ground around the wing wall.

10. Shortly after reconstruction of the wing wall and burying of the drainage line,

Complainant experienced water leakage and water accumulation in the basement of her unit in the area of the wall between her unit and the newly constructed wing wall.

11. One cause of the water leakage to Complainant's unit appears to have been a blockage in the extended drainage line buried by the Condominium. The blockage appears to have been the result of debris that collected in the drainage line after cleaning of the gutters by the Condominium.

12. Complainant has disconnected the buried drainage line and reconnected the above ground drainage line to her downspout. That is the present configuration of the drainage line as of the time of the December 15, 2004 hearing. Complainant testified that she no longer experiences water coming into her unit, but she does experience "wicking" or "leeching" of the cinder block walls in the basement of her unit.

13. Witnesses for the Condominium testified that cleaning the gutters and maintaining the drainage lines and downspouts free and clear is the responsibility of the unit owners. However, the Condominium does a community wide cleaning of the gutters and downspouts at least three times per year.

14. The Condominium made at least two requests to the Complainant for access to the Complainant's unit to inspect the water damage to Complainant's basement, one on July 30, 2004 by letter to Jean Smart from Allied Realty Corp., the manager of the Condominium, Respondent's Exhibit 6, and a second by letter dated October 28, 2004 to Jean Smart from David C. Gardner, the attorney for the Condominium, Respondent's Exhibit 7. Complainant has declined to allow representatives of the Condominium to enter into her unit.

15. The Condominium carries a Master Insurance Policy with a Two-Thousand

Dollar

(\$2,000.00) deductible.

16. The source and cause of the infiltration of water and dampness into

Complainant's

basement was not determined. The Panel asked whether the source might be overflowing of clogged gutters, backing-up of clogged downspouts, extension drains, and extension lines, or grading of the exterior of the property which resulted in a grade sloping toward rather than away from the unit, or a combination of those factors.

17. While the Condominium's President, Susan Kim, testified that the maintenance of

the gutters and downspouts in a clean, clear condition is the responsibility of the unit owners, she nevertheless stated, as referenced above, that the Condominium performs a cleaning of those elements at least three times a year. She also testified that if grading adjacent to the exterior building walls of the units was improper, then the Condominium would be responsible for restoring proper grading and would do so.

18. The Condominium witnesses produced photographs, Respondent's Exhibit 3, that many of the extension lines on downspouts in the Condominium are buried, and surface several feet away from the Condominium, usually at the sidewalk. These extension lines consist usually of a black plastic corrugated pipe approximately 3 inches in diameter like the Complainant's drainage line. Henry Jacobs, the Management Agent for the Condominium stated that because the extension lines are located in the general common elements, the Condominium has the authority to require unit owners to bury those lines, and that is the policy of the Condominium to

require that those lines be buried. Mr. Jacobs also testified that the reason is that it is considered unsightly to have the drainage lines located above ground, and that the grades in front of most units is such that there is a drop in terrain which allows the lines to be buried.

CONCLUSIONS OF LAW

1. The decision as to the type of Pest Management Agreement which the Respondent Condominium may enter into is a matter within the sound business judgment and authority of the Condominium. Absent a showing of fraud or bad faith or lack of authority, the Panel will not attempt to review a legitimate business decision of the Condominium. Black vs. Fox Hills, 90 Md App 75, 599 A2d 1228 (1992) .

2. The Condominium has done nothing to preclude unit owners from retaining pest control services which provide preventive maintenance, at the unit owner's expense. It is not an abuse of the Condominium's business judgment to enter into a contract which does not provide for preventive maintenance with regard to pest control for termites.

3. The wing wall is a general common element of the Condominium. It serves more than one unit. The Condominium is responsible for the maintenance and repair of the wing wall pursuant to Article VII, Section 1 of its By-laws. (Commission Exhibit 1, R-115) The fact that a portion of the wing wall is located within the area defined as part of the unit, where it attaches to the exterior walls of the units in question, does not change its character as a general common element.

4. The evidence did not establish a clear policy that extensions of drainage lines from downpouts must or have been uniformly buried. The Condominium requires the unit owners to

maintain these drainage lines. Consequently the Panel determines that it should not require the Complainant to bury her drainage line at least so long as she is required to maintain it.

5. The Condominium has agreed that it is responsible to regrade the areas adjacent to the building walls of units in order to assure that the slope of the ground is away from the building. Thus, to the extent that there is any regrading problem at Complainant's unit, or adjacent to, it which is causing water damage, the Condominium is responsible to correct that regrading problem.

6. The Condominium cannot proceed with any insurance claim unless the Complainant allows the Condominium to enter into her unit to assess her claim.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is this _____ day of _____, 2005

ORDERED:

1. The Pest Management Agreement dated October 1, 2003 that the Condominium has entered into is a matter within the sound business judgment of the Condominium and the Panel will not disturb that decision since there has been no finding of fraud or bad faith or lack of authority.

2. The Complainant is not required to bury the drainage line extending from her downspout.

3. The Condominium is ordered to investigate the grading of the property around Complainant's dwelling and the adjacent dwellings within thirty (30) days from the date of this order. If the grade away from the property needs to be reestablished, then the Condominium is ordered to take whatever actions are necessary to do so at its expense.

4. The Complainant has thirty (30) days from the date of issuance of this order to allow

the Condominium to enter into her property to begin processing any insurance claim related to the water damage to her unit. If after thirty (30) days she fails to allow entry, then the Condominium will no longer be responsible for any such claim or damages, whether or not covered by insurance as of the issue date of this order. This paragraph 4 applies only to claims which may exist related to water damage only, and not to any other or subsequent claims.

The foregoing was concurred in by Panel Members Eric Smith and Jeff Kivitz.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days of this Order, pursuant to the Maryland Rules of Procedures governing administrative appeals.

_____. John F. McCabe, Jr., Panel Chair